*** THE HON'BLE SRI JUSTICE J.CHELAMESWAR**

AND

*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**

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+ W.P.No.15981 OF 2005

% Dated 22-12-2005

Mr. X, Indian Inhabitant, Vizianagaram, Andhra Pradesh. .

.... Petitioner

Vs.

$ The Chairman, State Level Police Recruuitment Board, Lakadipool, O/o DGP, Hyderabad, Andhra Pradesh and five others.

…. RESPONDENTS

! Counsel for the Petitioner: Mr.Anand Grover

^ Counsel for the Respondents: G.P. for Services

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> HEAD NOTE:

? Cases referred

AIR 1997 Bombay 406

[2] Spl.Civil Appl.No.11766/2000, dt: 17.02.2001 of Gujarat High Court

[3] CCT 17/2000 dt: 28.09.2000 of Constitutional Court of South Africa

[4] L.C.No.24/98, dt: 10.05.2000, Labour Court of Namibia

[5] Appln.No. 3386/1999, dt: 05.09.2005 of C.A.T. Karnataka

[6] AIR 1997 SC 1125

[7] (2003)6 SCC 581

[8] (1979) 1 SCC 380

[9] AIR 1960 SC 384

[10] (1969)1 SCR 312

[11] AIR 1956 SC 520

[12] AIR 1962 SC 36

[13] (1967)2 SCR 29

[14] AIR 1974 SC 1

[15] (2001)7 SCC 708

[16] (2005)1 SCC 394

[17] (1998)7 SCC 676

[18] 1995 Suppl. 4 SCC 584

[19] (1961)2 SCR 931

[20] AIR 1997 SC 128

[21] (1998)8 SCC 296

[22] (2003)6 SCC 611

THE HON'BLE SRI JUSTICE J.CHELAMESWAR

AND

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P.No.15981 OF 2005

JUDGMENT: (per Hon'ble Sri Justice Ramesh Ranganathan)

Both Sri Anand Grover, learned counsel appearing on behalf of Sri Bhaskar Benny, learned counsel for the petitioner and the Learned Government Pleader for services, appearing on behalf of the respondents, agree that the writ petition itself be finally heard.

The writ petition is filed against the order of the A.P. Administrative Tribunal, (hereinafter referred to as the Tribunal), in O.A.No.4174 of 2004 dated

23.2.2005, wherein it was held that in view of Rule 13 of the rules, issued in G.O.Ms.No.315 Home Department dated 13.10.1999, read with Order 70(3) of the A.P. Revised police manual prohibiting entry of persons, having HIV positive, into government service, the action of the respondents in not sending the petitioner for training, on his provisional selection as a stipendiary trainee cadet sub-inspector, was legal and valid. Among the reliefs sought for in this writ petition, is for a declaration that Order 70.3 of the Revised A.P. Police Manual Part I, Volume I, is in violation of Articles 14, 16 and 21 of the Constitution of India.

Facts, to the extent necessary for this writ petition, are that on 7.12.2003 a notification was issued calling for applications from eligible candidates for the post of stipendiary cadet trainee sub-inspectors of police (civil). The petitioner, an armed reserve police constable, applied for the said post, since there was 14% reservation in favour of persons working in the police department. The petitioner qualified in the physical tests, completed the 5 km run within the stipulated 25 minutes and was thereafter permitted to appear in the written examination. Pursuant to the written examination held on 29.02.2004, the petitioner was provisionally selected as a sub-inspector of police. The 3rd respondent, vide letter dated 23.6.2004, directed the petitioner to be present, along with his certificates, on 24.6.2004, for verification and medical examination. Petitioner submits that he came to know later that he was not sent for training and was not appointed, as he had tested HIV sero positive, that he continues to perform his duties as an armed reserve police constable satisfactorily despite his HIV positive status and that he is fit to perform the duties assigned to a sub-inspector of police also. The petitioner, and another applicant, approached the A.P. Administrative Tribunal and filed O.A.Nos. 4174 and 4210 of 2004 respectively. Before the Tribunal, the respondents herein relied on Order 70(3) of the A.P. Revised Police Manual which requires candidates to undergo HIV test and renders persons with HIV positive ineligible for recruitment/appointment. The A.P. Police (Stipendiary Cadet Trainee) Rules, made in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India, prescribe the qualifying standards for appointment in the police force. While several factors such as colour blindness, squint, morbid conditions of eye, knock knees etc., are among the

disqualifications, the rules do not prescribe HIV as a disqualification. It is under Order 70(3) of the Revised A.P. Police Manual that this condition, of persons infected with HIV being rendered ineligible for appointment, is prescribed. Though the vires of Order 70(3) of the A.P. Revised Police Manual was not under challenge before the Tribunal, the petitioner would seek a declaration from this Court that Order 70(3) is in violation of Articles 14, 16 and 21 of the Constitution of India.

Petitioner contends that a person, though found HIV sero positive, would be fit to perform normal functions for long durations throughout the asymptomatic period, and it is only in the last stage (known as AIDS) that a person may be unfit to perform the functions or duties in his/her employment.

According to the petitioner a person's job not only provides him or her with daily sustenance but also helps to define his or her life and that most people, who are HIV positive, are fully capable of carrying out their job responsibilities and find comfort in continuing their employment, that persons with HIV positive would not put other employees at risk and as long as an HIV infected person is able to perform his job he should be treated as any other employee.

A counter affidavit is filed, on behalf of respondents 1 to 4, by the Chairman, State Level Police Recruitment Board wherein reference is made to the fact that the notification dated 17.12.2003 was issued pursuant to the A.P. Police (Stipendiary Cadet Trainee) Rules issued in G.O.Ms.No.315 dated 13.10.1999 and amended in G.O.Ms.No.48 dated 24.2.2001. It is admitted that the petitioner was provisionally selected for the post of stipendiary sub-inspector (civil) and that the rules require antecedent verification and medical examination of the provisionally selected candidates before finalizing their selections. It is stated that the petitioner underwent medical examination, along with other provisionally selected candidates, and as per the medical report given by the Resident Medical Officer, King George Hospital, Visakhapatnam, the petitioner is HIV reactive. Reference is made to Order 70(3) of the Revised A.P. Police Manual Part I, Volume I, approved in G.O.Ms.No.201 dated 8.9.2001, whereby all candidates selected provisionally as stipendiary cadet trainees, by direct recruitment, are required invariably to undergo medical examination for the HIV test and to produce the certificate and that Order 70(3)

renders persons with HIV positive ineligible for appointment. Reference is also made to the automax message dated 6.7.2004 whereby all unit officers were informed that candidates having HIV positive should not be finally selected and should not be sent for training and that the provisional selection of such candidates should be cancelled. While admitting that the special rules, issued in G.O.Ms.No.315 dated 13.10.1999, are silent regarding HIV positive being a disqualification, it is stated that since there is a specific provision in this regard in the A.P. Revised Police Manual, such a provision has necessarily to be taken into account and read along with the special rules in G.O.Ms.No.315 dated 13.10.1999, as long as there is no contradiction between the two. It is contended that persons infected with HIV would become weak and not be able to effectively perform the rigorous duties required of a police officer, and since the HIV test was not prescribed, at the time when the petitioner underwent selection for being appointed to the post of armed reserve police constable, it was not known as to whether he was HIV positive at the time of such selection itself. It is contended that mere selection does not confer any right for appointment and since the present rules prohibit appointment of persons with HIV positive, the petitioner cannot be appointed. It is contended that the guidelines issued by the Ministry of Health and Family Welfare, Government of India, relating to HIV infected persons, are general guidelines and cannot be applied for recruitment and appointment in the police department where persons appointed are required to satisfy the high standards of physical fitness and health prescribed. Reference is also made to certain press reports indicating that the armed forces have also decided to make HIV test mandatory for candidates to enter the service.

Since the constitutional validity of Order 70(3) of the Revised A.P. Police Manual was not the subject matter of challenge before the Tribunal and is put in issue for the first time in the present writ petition filed before this Court, and inasmuch as the counter affidavit, filed on behalf of respondents 1 to 4, is silent on this issue, this court, even after conclusion of submissions of both the Counsel on 15.11.2005, adjourned the matter by a week to enable the respondents to file an additional counter affidavit. Since no additional counter affidavit was filed, even by 28.11.2005, the writ petition, including the challenge to the vires of Order 70(3) of the A.P. Revised Police Manual, is being decided

on the basis of the material available on record.

Sri Anand Grover, learned counsel appearing on behalf of Sri Bhaskar Benny, learned counsel for the petitioner, would contend that the object of excluding persons with HIV positive, as a class, has no rational nexus with the object sought to be achieved i.e., the fitness of persons to discharge the duties and functions of officers in the police force. Learned counsel would submit that the petitioner had qualified in the physical endurance test and written examination and was found fit to discharge the duties of a sub-inspector of police. Learned counsel would state that the presumption that all persons infected with HIV are unfit, to discharge the onerous duties of police officers, has no rational basis and is not based on medical evidence. According to him, since the asymptomatic period ranges from 3 to 18 years, it must be presumed that at least for a period of 18 years, during the asymptomatic period, HIV infected persons would be more than able to effectively discharge their duties. While conceding that persons unfit, physically or mentally, to discharge the duties of an officer in the police establishment, cannot be appointed or continued in service, learned counsel would urge that periodical medical examination, once a year, to determine the fitness of HIV infected persons to continue in police service would ensure that the object of having persons fit to discharge the duties, prescribed for officers in the police force, is achieved. Learned counsel would submit that even among persons with HIV positive there are different categories, some of whom are in the early stages of the asymptomatic period, and others in the final stages and have AIDS. According to the learned counsel, it is only persons with AIDS who may not satisfy the high standards of physical and mental fitness required of police officers, and that grouping all HIV infected persons as one single class, though they are not all similarly situated, is an arbitrary and irrational classification in violation of Articles 14 and 16 of the Constitution of India. Learned counsel would submit that Order 70(3) of the Revised A.P. Police Manual is also discriminatory as only persons infected with HIV positive are excluded from consideration for employment in the police force while persons suffering from other debilitating diseases such as T.B., Cancer etc., who may, at advanced stages of such diseases, also not be physically fit to discharge the duties required of a police officer, are not excluded from consideration. According to the learned counsel while the stigma attached to this disease (HIV) is on account of the fear that it

is contagious, it is in fact caused only under four circumstances and does not otherwise spread to others. In terms of the physical and mental abilities of the persons infected, this disease, according to the Learned Counsel, compares favourably with other diseases, such as T.B. and Cancer. Learned Counsel would submit that excluding persons infected with HIV from consideration for appointment by direct recruitment, while permitting persons, already appointed, to continue in service despite their being infected with HIV, is discriminatory and is in violation of Articles 14 and 16 of the Constitution of India. Learned counsel would also refer to the National Aids Control Organization (NACO), Ministry of Health and Family Welfare, Government of India guidelines in support of his submission that persons infected with HIV cannot be excluded from consideration for employment under the State.

Learned counsel would submit that the petitioner successfully completed the prescribed physical endurance test and the written examination, that as an armed reserve police constable he has been and as a sub-inspector he will be able to perform his duties, that HIV is treatable and with a healthy and nutritious diet a person need not even start taking medicines for 10 to 15 years and thereafter medicines are available to prolong the healthy and functional life, that the prohibition, under the Revised A.P. Police manual, rendering persons, with HIV positive, ineligible for appointment is only a guideline, has no statutory basis and cannot be enforced in law, that NACO guidelines of the Central government will prevail over the guidelines issued by the State government in the A.P. Police Revised Manual, that Rule 12 of the A.P. State and Subordinate Service Rules, relating to qualifications for direct recruitment, provides that a person should be of sound health, active habits and free from bodily defect or infirmity rendering him unfit for such service and since the petitioner is of sound health and does not suffer from any bodily defect or infirmity, he is fit to perform his duties as a stipendiary trainee cadet sub-inspector of police, that formation of opinion by the respondents, that the petitioner was unfit, is without any basis since he had successfully completed the physical tests, that being tested HIV positive would not by itself render the petitioner unfit for employment and that disabling all persons, with HIV positive, from being considered for appointment as sub-inspectors violates their fundamental right to life and liberty

under Article 21 and to pursue an occupation of their choice under Article 19(1)(c) of the Constitution of India. Learned counsel would contend that there is no rational nexus between the policy enunciated in Order 70(3) of the A.P. Revised Police Manual and the object sought to be achieved and since the object of the rules is to have able persons in the police force, the petitioner, having satisfied the prescribed criteria, is a person fit to take up appointment as a sub-inspector of police. According to the learned Counsel, the petitioner is medically fit to perform his duties and does not pose a significant risk of transmitting HIV to any other person in the work place and that grouping all HIV sero positive persons together as a class as being unfit, apart from being discriminatory is arbitrary and irrational.

Learned counsel would place reliance on **MX of Bombay Indian Inhabitant v. M/s ZY, Chhotubhai Shambai Salve v. State of Gujarat**, **Jacques Charl Hoffmann v, South African Airways, N Applicant v. Minister of Defence** and **R.Ramesh Rao v. The Superintendent of Police, Shimoga**.

On the other hand, Learned Government Pleader for services submits that since the vires of Order 70(3) of the A.P. Revised Police Manual was not in issue before the A.P. Administrative Tribunal, it was not open for the petitioner to raise this plea for the first time before this Court and that it is not open for this Court, in the absence of adjudication by the Tribunal in this regard, to examine this issue. Learned Government Pleader would place reliance on **L.Chandra Kumar v. Union of India**.

Before examining the rival contentions, it is necessary to refer to the rules, regulations and guidelines governing appointment of sub-inspectors in the Police Establishment of the State of Andhra Pradesh.

Rule 12 of the A.P. State and subordinate service Rules relates to qualifications for direct recruitment and reads thus:-

Qualifications for direct recruitment:-

(1)(a). No person shall be eligible for appointment to any service by direct recruitment unless he satisfies the selection authority as well as the appointing authority, that:

i. he is of sound health, active habits and free from any bodily defect or infirmity rendering him unfit for such service;

ii. his character and antecedents are such as to qualify him for such service;

iii. he possess the academic and other qualifications prescribed for the post; and

iv. he is a citizen of India:

Provided that no candidate other than a citizen of India; may be appointed except with the previous sanction of the State Government and except in accordance with such conditions and restrictions as may be laid down. Such sanction shall not be accorded unless the State Government are satisfied that sufficient number of citizens of India, who are qualified and suitable are not available;

v. No person shall be eligible for direct recruitment if he is less than 18 years of age and unless otherwise specified in the special or adhoc rules and if he is more than 28 years of age as on the 1st day of July of the year in which the notification for selection to the relevant post, category or class or a service is made:

In exercise of powers conferred under the proviso to Article 309 of Constitution of India, the A.P. Police (Stipendiary Cadet Trainee) Rules were made in respect of appointment by direct recruitment of members of various non-gazetted executive ranks in the police department in the government of Andhra Pradesh. These Rules were notified in G.O.Ms.No.315, Home (Police-C) dated 13.10.1999. Rules 13, 14 and 15 thereof are relevant for the purpose of the present case and read as under:

"**Rule 13: General:**

1. The stipendiary Trainee shall be subject to the regulations of the Police Training Manual and other administrative instructions issued from time to time which are not covered under the Special Rules.

2. Nothing in these rules shall apply to the personnel who were appointed by direct recruitment in the Andhra Pradesh Police Subordinate Services, A.P. Special Armed Special Police Service and Andhra Pradesh Police (Finger Print Bureau/Police Transport Organization/Communications), Service prior to the issue of these rules.

14. Visual Standard:

Visual Standards for the selection of all categories of Stipendiary Trainee Cadets mentioned in these rules shall be as follows:

a. Standard-I

	Right Eye	Left Eye
(i) Distant Vision	6/6	6/6

(ii) Near vision 0/5 0/5

Standard – II

Better Eye Worse Eye

Distant Vision V V. Without glasses not below 6/24 and after

Correction with glasses not below 6/12

Near Vision – Read 0.8 Read – 1

b. Each eye must have a full field of vision

c. Colour blindness, squint or any morbid condition of the eye or lids or either eye, knock-knees, pigeon chest, flat foot, varicose veins, Hammer toes, fractured limbs and decayed teeth shall be deemed to be a disqualification

15. **Saving:**

Nothing contained in the Andhra Pradesh Police Subordinate Service Rules issued in G.O.Ms.No.1263, G.A. (Rules) Department, dated 26.8.1959 and as subsequently amended in G.O.Ms.No.270, Home Department, dated 2.4.1990 shall affect the operation of these rules regarding recruitment, academic qualification, age and Physical standards prescribed for various categories included in these rules.

The Government, vide G.O.Ms.No.261, Home (Police-C) Department dated 8.9.2001, approved the revised A.P. Police Manual, subject to the condition that the manual does not supersede any statutory rules, service rules, regulations and other orders issued by the government from time to time, that if there is any contradiction or conflict, the latter would prevail, and that the manual envisages only guidelines and procedures in accordance with the provisions of laws, Acts and Rules for all police officers. Order 70.1 relates to verification of antecedents and 70.2 and 70.3, which relate to medical examination, read as under:

"Medical examination:

2. All those found suitable in antecedents verification shall be sent to the Superintendent of the Headquarter Hospital of the District. In respect of Units located in Hyderabad City, they shall be sent to the Superintendent of Osmania General Hospital or Gandhi Hospital or Police Medical Officer, Amberpet for medical examination. Arrangements should be made in advance at these hospitals so that the medical examination is completed in one spell spread over a few days depending on the number of candidates. While forwarding the

cadets for medical examination, the appointing authority/officer nominated by the SLPRB should forward proforma indicating the prescribed standards of medical fitness applicable to each category of the candidates and obtain Certificates of fitness with reference to these standards. The specifications for medical fitness are in Annexure-4.

3. All candidates selected as Stipendiary Cadet Trainees by direct recruitment shall have to undergo medical examination at their own cost for screening of H.I.V. test invariably and produce the certificate. The candidates having H.I.V. positive will not be eligible for appointment.

Before examining the merits of the challenge to Order 70(3) of the A.P. Revised Police Manual and to the order of the A.P. Administrative Tribunal in O.A.No. 4174 of 2004 dated 23.02.2005, it is necessary to take note of certain facts, relating to the Human Immuno-deficiency Virus (HIV), and the Acquired Immuno – Deficiency Syndrome (AIDS).

From the moment scientists identified HIV and AIDS, social responses of fear, denial, stigma and discrimination have accompanied the epidemic. Discrimination has spread rapidly, fuelling anxiety and prejudice against the groups most affected, as well as those living with HIV or AIDS. The global epidemic of HIV/AIDS is associated with stigma, repression and discrimination, as individuals affected by HIV have been rejected by their families, their communities, and the society at large.

Human immunodeficiency virus (HIV) is a condition found in some human beings which predisposes a person with HIV to, and culminates in, acquired immunodeficiency syndrome (AIDS) within a period, on an average, of approximately 12 to 18 years. The immune system, a defence against diseases caused by foreign organisms, consists of white cells, including T-helper cells (also known as CD4 cells), in the blood as well as in the lymphatic systems. The immune system, recognizes foreign organisms (antigens) and to defend against the foreign bodies, manufactures anti-bodies which attack and destroy the antigen. In the case of persons found to be HIV positive, a virus known as the Human Immuno Deficiency Virus enters the human body and destroys the immune system itself, replicating in and later destroying the T Helper (CD-4) cells produced by the immune system. AIDS is the terminal stage of HIV infection. AIDS, however, is not a single disease but a collection of illness which affects people infected with HIV. Infection with the HIV virus initiates a process which causes a slow, steady destruction of those cells known as CD4

T-Lymphocytes. These cells, an important component of the human immune system, become progressively weaker, destroying the body's ability to fight infections and certain cancers. When the CD4 T-4 Lymphocytes cell count is severely depleted, the immune system becomes so weak that the body succumbs to certain infections and cancers. Collectively these are called "opportunistic diseases". When this occurs the person is said to have AIDS. If a person tests HIV positive, that does not mean that such person has AIDS nor does it mean that such person is terminally ill or will become terminally ill soon. It may take several years, for the HIV to completely damage the immune system. Information placed before this Court, on behalf of the petitioner, would show that within 3 to 8 weeks about 15% patients develop Acute Seroconversion illness with symptoms like flu, etc. and thereafter is a long asymptomatic period which can last between 3 to 18 years. While 3% of HIV positive patients are said to develop AIDS after three years of the entry of the virus, 20% do so within five years, 50% within 10 years, 65% within 12 years and 85% within 18 years. As at present it cannot be predicted with certainty, either by clinical, biochemical or immunological methods, as to who will develop AIDS and when. The timing of the terminal stage is uncertain. This uncertainty increases psychological stress which in turn lowers the CD-4 cell count thereby reducing the person's immune response. When the immune system is compromised, other diseases, known as secondary or opportunist infections, such as pneumonia, diarrhoea, etc., set in and since the human body is unable to combat these infections, these persons ultimately die on account of the secondary infections. It may take 3 to 6 months, after being infected with HIV, for clear signs that an infected person has, in fact, become HIV positive. This is known as the "window period". Medical evidence suggests that HIV can only be detected after 3 to 6 months of entry of the virus, and prior thereto a person cannot be tested for antibodies though she or he may be infected. During the window period, of 3 to 6 months, even if a person is tested negative, he may well be found to be HIV positive later. A blood test which indicates that a person is HIV positive is not an indication of that person's health on that date. Two other tests are necessary to determine whether a HIV positive person is ill. The first is to ascertain the infected person's CD-4 count. This is measured as the number of Cells per cubic millimeter of blood and indicates the degree of damage to the immune system. The lower the CD-4

count, the more damaged the immune system is. CD-4 counts, below 200 cmm, are associated with more rapid development of AIDS- related diseases. The second test necessary to ascertain the health of the person, who is HIV positive, is the Viral Load test. It measures the amount of virus multiplying in the blood at a given time. A high viral load indicates high levels of viral infection and a shorter time for the inevitable development of the “disease”. A low viral load means a slower rate of disease progression. There are drugs, i.e., medicines and treatment, which help to delay the onset and severety of the “opportunistic infections”, i.e., AIDS proper. In the long run, however, it is at present, an incurable and fatal condition which for convenience is called the “AIDS disease”.

HIV is transmitted to another by four methods viz., (1) blood transfusion – where HIV positive blood is transfused; (2) unprotected sexual intercourse with a HIV positive person; (3) Prenatal transmission from a HIV positive mother to her child during pregnancy and (4) Breast feeding of her child by a HIV positive mother. It is not transmitted by casual contact like working together, sharing toilets, washing clothes, sharing utensils and food, mosquito bites, touching, shaking hands etc. Even if a person is infected with HIV, he or she may well lead a healthy, active and productive life for a period of upto 18 years which period can be extended further with the introduction of ART. Antiretroviral drugs (ART) inhibit the replication of HIV. When antiretroviral drugs are given in combination, HIV replication and immune deterioration can be delayed, and survival and quality of life improved. Effective HIV/AIDS care requires antiretroviral therapy as a treatment option. The World Health Organisation (WHO) recommends that in ARV treatment programmes in resource-limited settings HIV infected adolescents and adults should start ARV therapy when they have clinical AIDS, regardless of the CD4 count. When total lymphocyte count can be assessed, in addition, people with stage II or III HIV disease should be offered treatment. When CD4 counts are available, all HIV infected people with less than 200 CD4 cells/mm3 should be offered treatment.

Because of the origins of the disease, of the way it is transmitted, and its rampant magnitude, ignorance and prejudice have shrouded all aspects of the

disease including its treatment and control. (**N Applicant**[4]) The triple drug combination therapy treatment, found to be effective in prolonging the healthy life of persons tested HIV positive, is said to cost a minimum of Rs.4000/- to Rs.12000/- per month. The Government of India is said to have recently started to provide this triple drug combination, free of cost, in a few government hospitals in six states in the country. Apart from medication, a healthy diet, nutritious food, clean drinking water and prevention from opportunistic infections is necessary for a person, infected with HIV positive, to prolong his life span.

The petitioner is one among a large section of our populace living with HIV. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalized. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are among the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against persons found to be HIV positive still persist. In view of the prevailing prejudice, any discrimination against them can be interpreted as a fresh instance of stigmatization and an assault on their dignity. The impact of discrimination on persons infected with HIV is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living.

The National AIDS Control Organisation published in 1995 a National HIV Testing Policy under the auspices of the Government of India. Ministry of Health and Family Welfare, according to which the popular belief is that HIV infection is invariably fatal irrespective of the best possible treatment, that HIV infection and AIDS are still associated with high degree of discrimination and stigmatization, and that the implications of a positive test go well beyond those related to physical and mental health and may involve loss of employment, medical and social benefits, insurance, friends, family and freedom of movement.

Chapter 7 of the National Aids Control Organization (NACO) guidelines relates to the National Guidelines for HIV Testing and Legal and Ethical Considerations and are as under:

"HIV testing has brought out a number of legal and ethical issues to the forefront HIV/AIDS is more of a social problem rather than a medical problem, people with HIV infection too have a role to play if the social ills associated with HIV infection and disease are to be minimized. There have been allegations of human rights violation across the globe and HIV infected persons have been discriminated. Different countries have adopted different National policies but one fact universally taken into consideration is that people with HIV/AIDS should have the same rights as normal persons to ensure that they are not discriminated in their communities. Research regarding drugs and vaccines against HIV/AIDS involving human subjects should also address legal, ethical and human rights dimensions. Archaic laws and gaps in the legal area needs to be looked into to address all these issues. There is also a need to reform laws which marginalize women and children, the most vulnerable group in the HIV/AIDS epidemic"

Before examining the vires of Order 70(3), it is necessary to deal with the preliminary objection, of the learned Government Pleader, to the maintainability of the writ petition. He would submit that since the petitioner had not challenged the vires of order 70(3) of the A.P. Revised Police Manual before the A.P. Administrative Tribunal, and had chosen to do so for the first time before this Court, this question ought not to be examined in proceedings under Article 226 of the Constitution.

I n **L. Chandra kumar**[6] the Supreme Court held that Administrative Tribunals would continue to act as Courts of first instance in respect of the areas of law for which they had been constituted and that it would not be open for litigants to directly approach the High Court, even in cases where they question the vires of statutory legislations, by overlooking the jurisdiction of the concerned Tribunals. While the constitutional validity of order 70(3) of the A.P. Revised Police Manual is in issue for the first time before this Court, the present writ petition has been filed against the order of the A.P. Administrative Tribunal in O.A.No.4174 of 2004. The petitioner has, in compliance with the law laid down in **L. Chandra Kumar**[6], invoked the jurisdiction of the Tribunal in the first instance and has only thereafter invoked the jurisdiction of this Court under Article 226 of the Constitution of India. We are not inclined to remand the matter back to the Tribunal to deal with the vires of Order 70(3) and intend to

deal with it ourselves, as larger public interest requires expeditious adjudication of this issue of utmost public importance as to whether persons who have tested HIV positive can, as a class, be denied access to public employment, more particularly employment in the police establishment. It is no doubt true that, in **T.K. Rangarajan Vs. Government of Tamilnadu**, the Supreme Court, after considering the judgment in **L. Chandra Kumar[6],** held that the High Court would not exercise its extraordinary jurisdiction under Article 226 of the Constitution of India if there is an alternative, effective and efficacious remedy available under law and that in very exceptional circumstances, the High Court could entertain writ petitions without the jurisdiction of the Tribunal having been invoked by litigants. It is not necessary for the purpose of this case to examine as to whether a writ petition can be entertained without the jurisdiction of the Tribunal having been invoked in the first instance, since the present writ petition is filed assailing the order of the A.P. Administrative Tribunal in O.A.No. 4174 of 2004 dated 23.02.2005. It is not as if this Court, under Article 226 of the Constitution of India, does not have the jurisdiction to examine the vires of statutory provisions or administrative instructions. We are therefore not inclined to non-suit the petitioner on this technical plea, more so, in view of the public importance of the issues raised in this writ petition, and the larger public interest in having these issues decided without further delay. While, normally, the vires of statutory provisions are also required to be raised, along with other issues, before the Tribunal in the first instance, in the peculiar facts and circumstances of the present case, and with a view to avoid delays which would result if the matter is remanded to the Tribunal for its adjudication on this issue, we propose to examine the vires of Order 70(3) of the A.P. Revised Police Manual ourselves. The objection raised by the learned Government Pleader to the maintainability of the writ petition is therefore rejected.

GROUPING ALL HIV POSITIVE APPLICANTS TOGETHER FOR DENIAL OF EMPLOYMENT IN THE POLICE ESTABLISHMENT- IS THE CLASSIFICATION VALID UNDER ARTICLE 14 AND 16 OF THE CONSTITUTION:

Order 70(3) of the A.P. Revised Police Manual is in the nature of administrative instructions and has necessarily to be read as supplementing and not supplanting the rules made in exercise of the powers conferred under

the proviso to Article 309 of the Constitution of India. Since the object of the rules, as is clear from Rule 12 of the A.P. State and Subordinate Service rules, is to ensure that appointment is made from among persons of sound health, active habits, free from bodily defect or infirmity rendering them unfit for service, the restrictions placed, under the administrative instructions in Order 70(3), can only be in furtherance of and must have a rational nexus with the aforesaid objects sought to be achieved by the rules.

Clause (1) of Article 16 guarantees equality for all citizens in matters relating to employment or appointment to any office under the State. The Government, be it at the state or the centre, is arguably the largest employer in the country and being considered for employment or appointment to an office under it is a valuable right possessed by citizens. Articles 14 and 16 do not forbid classification. The principle underlying the guarantee of Article 14 is not that the same rules of law should be made applicable to all persons within the territory of India irrespective of differences of circumstances. It only means that all persons similarly circumstanced should be treated alike and there should be no discrimination between one person and another if as regards the subject-matter of the law, their position is substantially the same. The process of classification empowers the State to determine who should be regarded as a class in relation to a law enacted on a particular subject. The classification to be valid, however, must not be arbitrary but must be rational. It must not only be based on some qualities or characteristics which are to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable nexus or relation to the object sought to be achieved. In order to pass the test of a valid classification, two conditions have to be fulfilled, namely: (*1*) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (*2*) the differentia must have a rational nexus or relation to the object sought to be achieved.

In **Special Courts Bill, 1978, In re,** the Supreme Court held:-

"(1) The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The second part, which is a corollary of the

first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favouritism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

(2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

(3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

(8) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense abovementioned."

"…… (11) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality".

What Article 14 of the Constitution prohibits is "class legislation" and not "classification for purpose of legislation". If the Executive reasonably classifies persons so as to bring them under a well-defined class, it is not open to challenge on the ground of denial of equal treatment that the law does not apply to other persons. Equality of opportunity in matters of employment under Article 16(1) means equality as between members of the same class of employees and not equality between members of separate, independent classes. (**All India Station Masters' and Assistant Station Masters' Association v. General Manager Central Railways; Sham Sunder v. Union of India.**

Unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by placing the necessary material before the court that the said classification is unreasonable and violative of Articles 14 and 16 of the Constitution. (**Banarsidas v. State of Uttar Pradesh, All India Station Masters' and Assistant Station Masters' Association[9], General Manager, Southern Railway v. Rangachari, Govind Dattatray Kelkar Vs. Chief Controller of Imports & Exports** and **State of J&K Vs. Trilokinath Khose.**

Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons

grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

Judicial scrutiny can therefore extend to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permissible it would be open to the Courts to substitute their own judgment for that of the legislature or the Rule-making authority on the need to classify or the desirability of achieving a particular object. (**Triloki Nath Khosa[14]**). Article 14 does not insist upon classification, which is scientifically perfect or logically complete. A classification would be justified unless it is patently arbitrary. In substance, the differentia required is that it must be real and substantial, bearing some just and reasonable relation to the object of the law. (**State of A.P. Vs. Nallamilli Rami Reddi, E.V. Chinnaiah Vs. State of A.P**).

The validity of the classification has to be judged on the facts and circumstances of each case. (**Trilokinath Khosa[14], Food Corporation of India Vs. Omprakash Sharma, E.V. Chinnaiah[16]**).

While persons who have tested HIV positive, can be said to constitute a class distinct from others who are not so infected and to satisfy the first of the twin conditions for a valid classification, i.e., the classification being founded on an intelligible differentia which distinguishes those that are grouped together from others, it is the second condition as to whether this differentia has a rational nexus or relation to the object sought to be achieved, which requires detailed examination. As stated supra, the object is to ensure that persons appointed in the police force are of sound health and are bodily and mentally fit to discharge the duties required of officers of the police establishment. Medical evidence placed on record reveals that, in terms of physical and mental fitness, not all persons who have tested HIV positive constitute a single class, for there are different categories among them, some of whom are in the early stages of the asymptomatic period and others in the final stages and suffer from AIDS. While those in the final stages who suffer from AIDS may justifiably be denied appointment in the police establishment on the ground that they lack the required physical and mental fitness, the same cannot be said of those in the

early stages of the asymptomatic period which, as stated supra, may range anywhere between 3 to 18 years, since during the prolonged asymptomatic carrier stage of HIV infection one remains fully active, physically and mentally. (**MX of Bombay Indian Inhabitant**[1]). While the medical evidence on record, of which the petitioner himself is a classic example, would reveal that these persons with HIV positive, at the early stages of the asymptomatic period, possess the physical and mental fitness required for employment in the police establishment, no evidence to the contrary has been placed by the respondents before this court. Grouping all persons with HIV positive together for denying employment on the erroneous presumption that they all lack the high standards of physical and mental fitness prescribed for appointment to posts in the police force does not satisfy the second of the twin conditions, for a valid classification, that the differentia must have a rational nexus to the object sought to be achieved. Since a valid classification would require segregation of a group of persons with common properties and characteristics, postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily, treating all HIV positive persons as one single homogenous class, irrespective of the stage of the disease, for being denied appointment in the police force is in violation of Articles 14 and 16 of the Constitution of India.

The mere fact that Order 70(3) is in the nature of administrative instructions, and does not have statutory force, is of no consequence since the mandate of Article 14 and 16 applies to administrative instructions also. (**Reserve Bank of India Vs. S. Jayarajan, Gajula Dasaratha Rama Rao Vs. State of A.P**). Nor do we find any force in the contention that the provisions of the A.P. Revised Police Manual, including Order 70(3), are matters of executive policy and cannot be subjected to judicial review under Article 226 of the Constitution of India, for it is well settled that if a policy decision is demonstrably capricious or arbitrary, is not informed by reason or suffers from the vice of discrimination or infringes any provision of the constitution it is liable to be struck down. (**Krishnan Kakkanth Vs. Govt. of Kerala**)

A similar question regarding denial of employment to HIV positive patients came up for consideration before the Bombay and Gujarat High Courts. In **MX**

of Bombay Indian Inhabitant[1], the Division Bench of the Bombay High Court, held thus:-

> Thus, no person can be deprived of his right to livelihood except according to procedure established by law. Obviously, such procedure established by law has to be just, fair and reasonable. In other words, such procedure also must pass the rigour of Art.14. The rule providing that person must be medically fit before he is employed or to be continued while in employment is, obviously, with the object of ensuring that the person is capable of or continues to be capable of performing his normal job requirements and that he does not pose a threat or health hazard to the persons or property at the workplace. The persons who are rendered incapable, due to the ailment, to perform their normal job functions or who pose a risk to other persons at the work place, say like due to having infected with some contagious disease which can be transmitted through the normal activities at the workplace, can be reasonably and justifiably denied employment or discontinued from the employment inasmuch as such classification has an intelligible differentia which has clear nexus with the object to be achieved, viz., to ensure the capacity of such persons to perform normal job functions as also to safeguard the interests of other persons at the workplace. But the person who, though has some ailment, does not cease to be capable of performing the normal job functions and who does not pose any threat to the interests of other persons at the workplace during his normal activities cannot be included in the aforesaid class. Such inclusion in the said class merely on the ground of having an ailment is, obviously, arbitrary and unreasonable.
>
> "The decision of the Apex Court in Anand Bihari's case (AIR 1991 SC 1003) although is in the context of the "continued ill health" as used in Section 2(oo) of the Act is also relevant to test the validity of the impugned rule. In the aforesaid case, the apex Court has observed that the expression "ill-health" used in sub-clause (c) has to be construed relatively and in its context. It must have a bearing on the normal discharge of duties. It is not any illness but that which interferes with the usual orderly functioning of the duties of the post which would be attracted by the sub-clause. Conversely, even if the illness does not affect general health or general capacity and is restricted only to a particular limb or organ but affects the efficient working of the work entrusted, it will be covered by the phrase. For it is not the capacity in general but that which is necessary to perform the duty for which the workman is engaged which is relevant and material and should be considered for the purpose. Therefore, any disorder in health which incapacitates an individual from discharging the duties entrusted to him or affects his work adversely or comes in the way of his normal and effective functioning can be covered by the said phrase. The phrase has also to be construed from the point of view of the consumers of the concerned products and services. If on account of a workman's disease or incapacity or debility in functioning, the resultant product or the service is likely to be affected in any way or to become a risk to the health, life or property of the consumer, the disease or incapacity has to be categorized as ill-health for the purpose of the said sub-clause. In our opinion, the criteria which have been applied by the apex Court in the aforesaid case for determining whether a person suffers from ill-health can justifiably and reasonably apply even to judge "medical fitness" of

the person prior to his employment. So tested, the impugned rule which denies employment to the HIV infected person merely on the ground of his HIV status irrespective of his ability to perform the job requirements and irrespective of the fact that he does not pose any threat to others at the workplace is clearly arbitrary and unreasonable and infringes the whole some requirement of Art. 14 as well as Art. 21 of the Constitution of India. Accordingly, we hold that the circular dated April 8, 1993 insofar as it directs that if the employee is found to be HIV positive by ELIS test, has services will be terminated is unconstitutional, illegal and invalid and, therefore, is quashed.

However, though an employee or prospective employee may not be medically unfit merely by virtue of his having been infected by HIV, that he is capable of discharging the normal job functions can be legitimately insisted upon before the person is employed for a particular job. Further, whether by virtue of his ailment, he poses any health hazard to others at the workplace can also be investigated. But then in such a case, there cannot be any generalization and the issue will have to be decided in respect of each individual case. For example, a person maybe HIV positive and may also be afflicted by opportunistic disease rendering him disabled to perform the job requirements or rendering him a potential risk or threat to other persons who may come in his contact at the work place. Whether it is so is always a question of fact and these aspects should be determined on the basis of not merely the result of the medical test but on the basis of the opinion of competent medical expert in that behalf.

"…….In our opinion, the State and public Corporations like respondent No.1 cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment till superannuation. As is evident from the material to which we have made a detailed reference in the earlier part of this judgment, the most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person. This is also necessary for prevention and control of this terrible disease. Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the Constitution. The interests of the HIV positive persons, the interests of the employer and the interests of the society will have to be balanced in such a case. If it means putting certain economic burden on the State or the public Corporations or the society, they must bear the same in the larger public interest."

"Therefore, in every such case, the test of medical fitness prior to employment or even during employment has necessarily to be co-related with the person's ability to perform the normal job requirements and any risk of health hazard he may pose to others at the workplace."

In **Chhotubhai Shambhai Salve**[2], the Gujarat High Court held that the action of the respondents in deleting the name of the petitioner from the select list, on the ground that he had tested HIV positive, was illegal and violative of Articles 14 and 16 of the Constitution of India.

In **Mr `X' v. Hospital 'Z',** the Supreme Court held :-

"……..The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitled to all respect as human beings. Their society cannot, and should not be avoided, which otherwise, would have a bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some American decisions. (School Board of Nassau Country, Florida v. Airline, 107 S Ct 1123 (1987); Chalk v. USDC CD of Cal., (9th Circuit 1988) 840 2 F 2d 701; Shuttleworth v. Broward Cty., (SDA Fla 1986) 639 Supp 654; Raytheon v. Fair Employment and Housing Commission, Estate of Chadbourne 261 Cal Rep 197 (1989)……"

Order 70(3) is ultravires Articles 14 and 16 of the Constitution of India. If, as held by the Supreme Court, government jobs cannot be denied to the persons with AIDS which is the final stage of HIV, persons who have tested HIV positive, at the early stages or during the asymptomatic period cannot be placed on a worse footing and denied employment in the police force when they satisfy the physical and mental standards prescribed for appointment in the police establishment. The sanitization of the police force, through a process of preventing entry of persons found to be HIV positive, is inhuman and without justification. We can forget at our peril, similar lessons from history where, in the not too distant past, sanitization of German society and pogrom of the Jews was justified by the Third Riech as in the interest of ensuring purity of the Aryan race.

Order 70(3) of the A.P. Revised Police Manual, which denies persons access to employment in the police force merely on the ground of their being found HIV positive despite the fact that they have fulfilled the physical and other standards prescribed under the rules, is clearly arbitrary and unreasonable and violates the equality clause in Articles 14 and 16 of the Constitution of India.

IS DENIAL OF PUBLIC EMPLOYMENT, TO PERSONS WHO HAVE TESTED

HIV POSITIVE DISCRIMINATORY?

Order 70(3) disentitles person with HIV positive from being appointed to posts in the police establishment. No rule has been brought to our notice which disentitles persons already employed in the police establishment from continuing in service despite their being found HIV positive. Is this not discriminatory and in violation of Articles 14 and 16 of the Constitution, asks the petitioner?

Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis. (**Triloki Nath Khosa**[14]).

In **"John Vallamattom v. Union of India,** the Supreme Court held:-

"Article 14 of the Constitution states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India…….The guarantee of equal protection embraces the entire realm of "State action". It would extend not only when an individual is discriminated against in the matter of exercise of his right or in the matter of imposing liabilities upon him, but also in the matter of granting privileges etc. In all these cases, the principle is the same, namely, that there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same. In my view, all persons in similar circumstances shall be treated alike both in privileges and liabilities imposed. The classification should not be arbitrary; it should be reasonable and it must be based on qualities and characteristics and not any other who are left out, and those qualities or characteristics must have reasonable relations to the object of the legislation……."

At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the right or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim. (**Jacques Charl Hoffmann**[3]).

On medical evidence, available as at present, it is clear that not all

persons living with HIV are prone to contracting infectious diseases – it is only those person whose infection 'has reached the stage of immunosuppression, and whose CD4+ count has dropped below 350 cells per microlitre of blood. The conduct of the respondents towards those police officers, who are already in its employ is irreconcilable with the stated purpose of its executive instructions. It is not the case of the respondents that it tests those already employed in the police establishment for HIV/AIDS. They may continue to work despite the infection, and regardless of the stage of the infection. Yet they may pose the same health, safety and operational hazards as prospective police officers. Apart from this, the practice also pays no attention to the window period. If a person happens to undergo a blood test during the window period, he would test negative and can thus secure employment. But if the same person undergoes the test outside of this period, he or she will test positive and not be employed.

Order 70(3) of the A.P. Revised Police Manual undoubtedly discriminates, those persons who have tested HIV positive seeking appointment in the police force vis-à-vis those tested HIV positive after appointment in the police establishment and those tested during the window period, and falls foul of the equality clause enshrined in Articles 14 and 16 of the Constitution of India. If all HIV positive patients are to constitute a class, there cannot be a further classification between those are already employed, those who were tested during the window period and after appointment were found to be HIV positive and those after being tested HIV positive seek appointment in services under the state as they satisfy the prescribed physical and other standards.

The fact that some people found to HIV positive may, under certain circumstances, be unsuitable for employment in the police force does not justify the exclusion from employment of all people who are living with HIV. Were this to be the case, people who are HIV positive would never have the opportunity to have their medical condition evaluated in the light of current medical knowledge for a determination to be made as to whether they are suitable for employment in the police force. On the contrary, they would be vulnerable to discrimination on the basis of prejudice and unfounded assumptions. This is manifestly unfair. The constitutional right of the petitioner not to be unfairly discriminated against cannot be determined by ill-informed

public perception regarding persons with HIV. Prejudice can never justify unfair discrimination. People who are living with HIV must be treated with compassion and understanding. They must not be condemned to "economic death" by the denial of equal opportunity in employment. This is particularly true in our country, where the incidence of HIV infection is said to be disturbingly high. Not all people who are living with HIV are unsuitable for employment. It is only those whose CD4+ count has dropped below a certain level who may become unsuitable for employment. Having regard to all these considerations, denial of employment to the petitioner, who had fulfilled the prescribed physical and other standards, only because he was tested HIV positive impaired his dignity and constituted unfair discrimination. (**Jacques Charl Hoffmann**[3]) . Since Order 70(3) is patently arbitrary, irrational and discriminatory it is ultravires Articles 14 and 16 of the Constitution of India. As a result no person can be denied employment solely on the ground that he has tested HIV positive.

Since we have declared Order 70(3) of the A.P. Revised Police Manual ultravires Article 14 and 16 of the Constitution of India, it is not necessary for us to examine the challenge to its vires under Articles 19(1)(c) and 21 of the Constitution of India.

Relief to be granted:

While the petitioner can no longer be denied employment solely on the ground that he has tested HIV positive as the prohibition in this regard, in Order 70(3) of the A.P. Revised Police Manual has been declared ultravires and illegal, that does not mean that he is entitled straightaway to be appointed as a stipendiary trainee cadet sub-Inspector. The physical endurance test which the petitioner successfully completed was nearly two years ago and before he is given orders of appointment the respondents would undoubtedly be justified in examining whether the petitioner continues to maintain the exacting physical standards required for being appointed as a sub-Inspector of police. The respondents are accordingly directed to verify whether the petitioner, in his present condition, complies with the physical standards prescribed under the Rules and, in case he satisfies the required standards, appoint him as a stipendiary cadet Trainee sub-Inspector. The entire exercise shall be completed within a period of three months from the date of receipt of a copy of this order.

The writ petition is accordingly allowed. There shall however be no order as to costs.

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J. CHELAMESWAR, J

Dt: .12.2005.

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RAMESH RANGANATHAN, J

MRKR/ASP